

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-5021

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

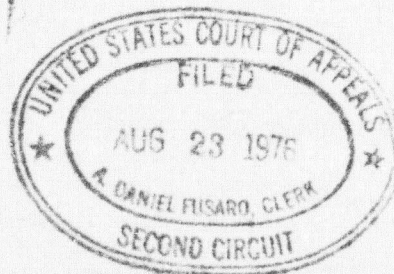
In the Matter of
CHILI HEIGHTS ASSOCIATES

Debtor in Possession

IN PROCEEDINGS FOR REAL PROPERTY ARRANGEMENT
UNDER CHAPTER XII OF THE NATIONAL BANKRUPTCY ACT

RESPONDENTS BRIEF ON APPEAL FROM THE DECISION AND ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK DATED APRIL 26, 1976
BK-75-4635

MORTON BORNSTEIN
Attorney for Respondents, Chili Heights Associates
Office and Post Office Address
2912 Delaware Avenue
Kenmore, New York 14217
(716) 874-1550



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MEMORANDUM OF LAW

FACTS

The individual partners of CHILI HEIGHTS ASSOCIATES, a debtor in possession under Chapter XII of the National Bankruptcy Act, were compelled to form a corporation known as Chili Heights Apartments, Inc. and sign notes of indebtedness, as guarantors in order to obtain bank financing for the construction of 251 apartment units in the Town of Chili, New York.

The requirement by the banks to form a corporation was so that the banks could charge more than the New York State legal rate of interest on the construction loans.

During construction title was transferred to the partnership after each draw of construction money from the lender.

The partnership filed a petition in Chapter XII on or about January 1, 1976, thereupon the Bankruptcy Judge on January 5, 1976 enjoined suits against the partners on their guarantees.

Thereafter, on January 29, 1976, he modified his January 5th order which stated that only suits against Chili Heights Associates are stayed, deleting stay protection for the individual partners in respect to their guarantees.

This order was reversed by the United States District Court, and the order of January 5th was thus reinstated, staying suits of the individual partners as guarantors.

This U.S. District Court order is the order that is being appealed before this Court.

QUESTION PRESENTED

Are the individual partners of the debtor entitled to a stay of suits on their guarantees as partners?

ARGUMENT

THE INDIVIDUAL PARTNERS OF THE DEBTOR ARE ENTITLED TO A STAY OF SUITS ON THEIR GUARANTEES AS PARTNERS.

This partnership is made up of individual partners who signed guarantees for construction money. The form of the transaction was for the convenience of the banks, however the substance of the transaction was a partnership borrowing construction funds. Any lender would require the individual partners to sign as partners, makers, co-makers or guarantors if the partnership form were used.

Therefore, the loan of funds was actually to the partnership, a debtor in possession, thus only differing in form.

The Bankruptcy Court has power to stay suits against a debtor and in fact, has done so. However, appellant refuses to see the identity of interest between the partnership and the nominee corporation. Appellant cites procedural rules to adversely affect the substantive

rights of the members of the debtor partnership.

If the Courts of Bankruptcy cannot protect its debtor against suits like the ones in the case at bar, the Court would be frustrating itself in achieving a plan of reorganization. The Bankruptcy Court has ample powers and jurisdiction to accomplish their purpose. Ex Parte Christy 44 U.S. (3 HOW) 292

The stays granted here are in reality stays protecting all the partners as partners although they individually signed their names as guarantors.

If the Courts in Bankruptcy could not stay these suits on the guarantees, then the judgment creditor under New York's Partnership Law, section 54, subdivision (1) could on application obtain a charging order which is a lien, against the partnership entity; the Court could appoint a receiver of the partners share of the profits, and of any other money coming to him in respect to the partnership.

Also, the Court could make any orders which the debtor-partner is entitled which includes a forced dissolution, a foreclosure of the charging lien and a public sale of partnership assets to reach any surplus.

To expose the partnership to the above possibilities would interfere with the proceedings in Chapter XII to such a degree that the Bankruptcy Court would be ousted of jurisdiction and frustrated in its efforts to achieve a plan of reorganization, which is the paramount consideration involved. Colonial Realty Insurance Company v. Martin 516 F2 154 (1 Cir. 1975)

The cases cited by the appellant are procedural in nature. The cases he uses for furthering his claim are corporate reorganization cases that have no bearing on partnerships, or Chapter XII proceedings.

Further, the basic fundamental distinction between corporate obligations and partnership obligations of debt and the unlimited liability of the partners in a partnership is ignored by the appellant in his brief.

It is this difference that must allow the Courts of Bankruptcy to exert their stay power to not have interference with their proceedings in reorganization.

In essence, a corporate creditor can never reach the individual property of shareholders beyond their investment in the corporation itself, nor can creditors of the individual shareholders reach any corporate asset or force a dissolution, in satisfaction of any claim. Partnership creditors and creditors of the individual partners, however, can easily cross over this line of form and seize the assets of the partner or force a dissolution of the partnership.

It must be recognized that a Federal Court, be it the Bankruptcy Court or District Court, has the power to stay suits against the individual partners of the debtor in possession herein, or Chapter XII and the spirit of reorganization which Congress has generally sought to infuse into the National Bankruptcy Act, will be meaningless and a futile effort for all involved.

CONCLUSION

The order staying suits against the individual partners of Chili Heights Associates should be affirmed and the appeal therefrom dismissed, with cost and disbursements of the appeal being awarded to the respondents herein.

Respectfully submitted,

MORTON BORNSTEIN
Attorney for respondents
Office and Post Office Address
2912 Delaware Avenue
Kenmore, New York 14217
(716) 874-1550

MORTON BORNSTEIN
ATTORNEY AND COUNSELOR AT LAW
2912 DELAWARE AVENUE
KENMORE, NEW YORK 14217
TEL: (716) 874-1550

August 19, 1976

Mr. A. Coleman
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

RE: Chili Heights Associates
Docket No. 76-5021
Chapter XII BK-75-4635

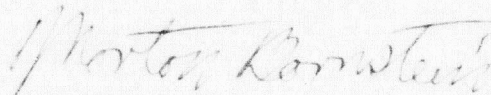
Dear Sir:

Enclosed please find ten (10) copies of Respondents
Brief in the above matter which is scheduled to be argued during
the week of September 13, 1976.

I have served two (2) copies of the same brief on my
adversary, William S. Thomas, Jr., this same day.

Please advise as to the date and time which has been
scheduled for the oral argument on this appeal.

Very truly yours,


Morton Bornstein

MB:ch
Enc./